

ORIGINAL



0000095345

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
SANDRA D. KENNEDY
PAUL NEWMAN
BOB STUMP

RECEIVED

2009 APR 13 P 1: 58

Arizona Corporation Commission

AZ CORP COMMISSION
DOCKET CONTROL

DOCKETED

APR 13 2009

DOCKETED BY

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE FORMAL
COMPLAINT OF CHARLES J. DAINS
AGAINST RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

**ANSWER TO FORMAL
COMPLAINT AND RIGBY
WATER COMPANY'S MOTION
TO DISMISS**

ANSWER

Respondent Rigby Water Company ("Rigby"), through undersigned counsel, answers the Complaint filed by Charles J. Dains as follows:

I. AS TO JURISDICTION.

Contrary to the Complaint, Rigby suggests that the Commission should decline jurisdiction over what is essentially a private contractual matter. While Rigby is a private water utility that provides service to the Terra Mobile Ranchettes Estates ("Terra Ranchettes"), the Formal Complaint filed on behalf of Mr. Charles J. Dains ("Mr. Dains") does not provide any basis for action by the Commission. As set forth below, the Complaint should be dismissed for this reason, among others.

II. AS TO ALLEGATIONS RELATING TO THE PARTIES' AGREEMENT.

Rigby admits that it is a party to a 1999 agreement with Mr. Dains, but otherwise denies knowledge as to the allegations contained in Section II of the Complaint and,

1 therefore, denies the same. Rigby further states that the agreement attached to the
2 Complaint speaks for itself, and that Mr. Dains' age at the time of executing the agreement
3 between the parties, or at this date, is irrelevant.

4 **III. AS TO THE ALLEGED "OVERESTIMATION" OF REFUNDS.**

5 Rigby denies the allegations contained in Section III of the Complaint. Contrary to
6 Section III of the Complaint, Mr. Dains, not Rigby, constructed the water system serving
7 Terra Ranchettes prior to entering into any agreement with Rigby. Mr. Dains began
8 constructing the water system for Terra Ranchettes in or about March 1996. Construction
9 was completed in or about June 1997. During the course of construction, Rigby informed
10 Mr. Dains that Commission rules would require the parties to enter into an agreement
11 related to the extension of water service to Terra Ranchettes. [See Exhibit A (January 26,
12 1996 pre-construction letter to Mr. Dains from Ted Wilkinson).] Mr. Dains did not respond
13 to that letter.

14 Following construction of the system, Mr. Dains requested that Rigby enter into an
15 agreement under which Rigby would assume control and operation of the system and
16 Mr. Dains would be repaid some of the costs associated with construction of the system. At
17 that time, Rigby utilized data obtained from meters Mr. Dains installed to homes in Terra
18 Ranchettes to estimate annual water usage. Mr. Dains, as the developer of Terra Ranchettes,
19 was provided with copies of the information used by Rigby and the estimates prepared by
20 Rigby, but as the developer of the system had more knowledge of his system and its
21 delivery history than Rigby. Based on those estimates, the parties agreed to enter into a
22 refund agreement with a term of 20 years. That agreement required Rigby to refund ten
23 percent (10%) of the annual amount it received for water sales to Terra Ranchettes to Mr.
24 Dains. The agreement exceeded the minimum requirements set by the Commission by ten
25 years and also contained, in accordance with Commission Rules, an express recognition that
26 Mr. Dains might not be fully compensated for the cost of the Terra Ranchettes system.
27 [Complaint, Exh. A, § 16 (any amount not refunded at end of term is considered an
28

1 unrecoverable contribution in aid of construction).] The Agreement does not require Rigby
2 to fully refund all construction costs to Mr. Dains, consistent with Commission Rules and
3 other mainline extension agreements. The agreement was dated October 1, 1998 and signed
4 by Mr. Dains on March 1, 1999, nearly two years following completion of his construction
5 of the system.

6 With respect to Mr. Dains' alleged "repeated requests" for an accounting, Mr. Dains
7 wrote a single letter to Rigby after he learned that the City of Avondale ("City") had
8 expressed an interest in purchasing Rigby in 2006. That letter was dated July 25, 2006.
9 [Exh. B (July 25, 2006 letter from Mr. Dains to Rigby).] When Rigby disputed Mr. Dains'
10 self-serving assertions, Mr. Dains filed an informal complaint with the Commission on
11 October 19, 2006. [Exh. C (Informal Complaint No. 2006-56033).] In response, Rigby
12 provided a complete accounting of the refunds made to Mr. Dains to Staff. No Commission
13 action was taken on Mr. Dains' informal complaint. Furthermore, Mr. Dains has received
14 and cashed an annual refund check from Rigby since 1999. Not until 2006, after learning of
15 the City's proposed acquisition of Rigby, did Mr. Dains ever question the amount of his
16 annual refund.¹

17 **IV. AS TO THE FILING OF THE "MAIN EXTENSION AGREEMENT".**

18 The Complaint quotes Commission Rule R14-2-406(M), but fails to mention that
19 Mr. Dains' acts and refusals to act have prevented the filing and approval of the parties'
20 agreement. Under the rule cited by Mr. Dains, no mainline extension agreement "shall be
21 approved unless accompanied by a Certificate of Approval to Construct as issued by the
22 Arizona Department of Health Services." In addition, approval of a mainline extension
23 agreement requires substantiation of costs to the Commission. Mr. Dains, who designed and
24 constructed the Terra Ranchettes system, with little or no input from Rigby, was exclusively
25

26 ¹ Rigby will provide the information previously provided to the Commission,
27 including the account numbers for homes in Terra Ranchettes, the amount billed on a
28 monthly basis, and the total amount billed to customers in Terra Ranchettes, to Mr. Dains.

1 responsible for providing the Certificate of Approval to Construct, the necessary "as-built"
2 drawings and for substantiating construction costs. [Complaint, Exh. A, §§ 6, 14, 19.]
3 Despite repeated requests for this information, Mr. Dains has never provided the required
4 Certificate of Approval to Construct, "as-built" drawings or supporting invoicing for
5 claimed construction costs.

6 In addition, the Complaint fails to note that Mr. Dains did not make any actual
7 "advance in aid of construction" to Rigby. Commission Rule R14-2-406(B) recognizes that
8 an "applicant for the extension of mains may be required to pay to the [water service
9 provider], as a refundable advance in aid of construction, before construction is commenced,
10 the estimated reasonable costs of all mains, including all valves and fittings." Here,
11 Mr. Dains made no such payments to Rigby. Instead, Mr. Dains requested that Rigby
12 assume operation and maintenance of the existing Terra Ranchettes system after Mr. Dains
13 had completed construction and began selling lots to individual homebuyers. At that
14 juncture, Rigby agreed to assume operation and control of system and, in exchange, agreed
15 to refund a portion of the revenues from the system to Mr. Dains. Rigby has lived up to its
16 obligations. Accordingly, Mr. Dains' request for an immediate refund of the cost of the
17 Tierra Ranchettes' system is not justified.²

18
19 **V. AS TO THE CITY OF AVONDALE'S POTENTIAL ACQUISITION OF RIGBY.**

20 Finally, the Complaint alleges that Rigby might somehow be unjustly enriched if it is
21 acquired by the City. Rigby denies these allegations. To date, the City and Rigby have not
22 reached agreement on any acquisition. There are no ongoing negotiations between the City
23 and Rigby. While the City filed an action in condemnation in January 2009, the City has
24

25
26 ² Rigby also notes, on information and belief, that Mr. Dains accounted for the costs
27 of constructing the Terra Ranchettes system in his pricing of individual lots, as Mr. Dains
28 began selling lots prior to entering into the agreement with Rigby. To the extent Mr. Dains
recouped his costs through such lot sales, he has no valid complaint against Rigby.

1 not served Rigby with that complaint. At this juncture, and given the current economic
2 climate, it is unclear whether the City still intends to acquire Rigby.

3 Furthermore, the Complaint fails to state a legal basis for its unjust enrichment
4 allegations. The Complaint makes no allegations (and cannot make such allegations) that
5 Rigby would not abide by its agreement with Mr. Dains. As discussed below, Mr. Dains'
6 invocation of Commission Rule R14-2-406(F) provides no basis for relief as that rule has no
7 applicability to the present situation.

8 Finally, to the extent that the Complaint alleges that Mr. Dains is entitled to recoup
9 all of the funds he invested in the Terra Ranchettes system, there is simply no support for
10 that position in law. As the Commission is well aware, the vast majority of mainline
11 extension agreements do not result in full repayment of the costs advanced by a developer.
12 Commission Rule R14-2-406(D) expressly provides that "the "balance remaining at the end
13 of the ten-year period set out shall become non-refundable, in which case the balance not
14 refunded shall be entered as a contribution in aid of construction" The parties'
15 agreement expressly recognized that Mr. Dains might not fully recover the alleged
16 construction costs of the Terra Ranchettes system. [Complaint, Exh. A, § 16.] The City's
17 potential acquisition of Rigby is irrelevant to the contractual claims being asserted by
18 Mr. Dains. As a result, Mr. Dains has failed to state a viable complaint against Rigby.

19 AFFIRMATIVE DEFENSES

20 In addition to being factually deficient, Rigby also notes that the Complaint is barred,
21 in whole or in part, by the following affirmative defenses:

- 22 A) The Complaint fails to state a cause of action upon which relief may be granted;
- 23 B) The Complaint is barred by the doctrines of waiver and estoppel;
- 24 C) The Complaint is barred by the relevant statute of limitations;
- 25 D) The Complaint is barred by the doctrine of accord and satisfaction; and
- 26 E) The Complaint is barred by the Commission's prior rejection of Mr. Dains'
27 informal complaint.
- 28

MOTION TO DISMISS

Having fully answered the Complaint, Rigby further moves to dismiss the Complaint, pursuant to Commission Rule R14-3-106(H), on the grounds that (1) the Complaint violates the applicable statute of frauds, (2) Mr. Dains has failed to provide any jurisdictional basis for the requested relief from the Commission, and (3) the Complaint fails to state a claim upon which relief may be granted.

A. The Complaint is Barred by the Relevant Statute of Limitations.

The Complaint purports to seek recovery pursuant to A.R.S. § 40-248. That statute, however, contains a two-year statute of limitations. Specifically, A.R.S. § 40-248 provides that “[a]ll complaints concerning excessive or discriminatory charges shall be filed with the commission within two years from the time the cause of action accrues ...” Here, the actions complained of in the Complaint began, at the latest, upon the execution of the agreement between the parties in March 1999, over nine years ago. To the extent Mr. Dains seeks to recover pursuant to A.R.S. § 40-248, Mr. Dains’ Complaint is barred by the relevant statute of limitations.

Where, as here, a Complaint demonstrates on its face that the cause of action is barred, dismissal is appropriate absent fraudulent concealment. See Cooney v. Phoenix Newspapers, Inc., 160 Ariz. 139, 140-41, 770 P.2d 1185, 1186-87 (App. 1989) (affirming summary judgment for defendant and holding that no proof existed to show that actions were intended to conceal the cause of action). To plead fraudulent concealment, a complainant must allege and prove a “positive act by the defendant taken for the purpose of preventing detection of the cause of action.” Id. at 141, 770 P.2d at 1187.

Mr. Dains has not (and cannot) allege or prove any concealment by Rigby. Mr. Dains began receiving annual rebates in 1999. He did not raise any issue with the amount of those refunds until 2006, after learning of the City’s potential acquisition of Rigby. Even assuming for the sake of argument, however, that Mr. Dains did not discover the actions complained of until just prior to the filing of his informal complaint, the

1 Complaint is still untimely on its face. Mr. Dains filed his informal complaint with the
2 Commission in or about October 2006, approximately two and a half years ago. There is no
3 doubt, as a matter of law, that Mr. Dains' cause of action had accrued as of the filing of his
4 informal complaint in 2006. The two year statute of limitations bars this 2009 action.
5 Mr. Dains' current Complaint falls afoul of the statute of limitations found in A.R.S. § 40-
6 248 and should be dismissed.

7 **B. The Complaint Should be Dismissed for Lack of Jurisdiction.**

8 The Complaint also fails to provide a jurisdictional basis for pursuing this private
9 contractual matter in this forum at this time. Mr. Dains is not complaining that Rigby has
10 overcharged him or charged unreasonable rates. Instead, Mr. Dains is focused on the City's
11 potential acquisition of Rigby and any profits Rigby might make in such an acquisition. He
12 further alleges that Rigby will be unjustly enriched if the City acquires Rigby. As a result,
13 Mr. Dains requests that he receive an immediate refund of all the amounts he allegedly paid
14 to construct the Terra Ranchettes system.

15 In taking these positions, Mr. Dains selectively quotes Commission Rules and
16 ignores relevant facts to try and force Rigby to pay Mr. Dains amounts that he is not entitled
17 to receive pursuant to the parties' agreement. Mr. Dains' Complaint essentially seeks civil
18 remedies available through the Superior Court in this administrative tribunal. Mr. Dains has
19 cited no jurisdictional basis for his requested relief. Absent such a basis, the Complaint
20 should be dismissed for lack of jurisdiction.

21 **C. The Complaint Fails to State a Cause of Action Pursuant to Commission**
22 **Rule R14-2-406(F).**

23 Finally, the Complaint should be dismissed as it does not present an actual
24 controversy for resolution. As noted above, it is unclear at this juncture if the City will
25 actually proceed with the acquisition of Rigby. There are no ongoing negotiations with the
26 City. Thus, the Complaint is premature. Moreover, even if the City proceeds with an
27 acquisition, Commission Rule R14-2-406(F) provides no basis for relief to Mr. Dains.
28 Commission Rule R14-2-406(F) is triggered by the transfer of a Certificate of Convenience

1 and Necessity ("CC&N") from one private utility to another. Here, there will be no transfer
2 of Rigby's CC&N, even if the City acquires Rigby. The procedural provisions of
3 condemnation law in Superior Court would provide Mr. Dains with any further remedies, if
4 any exist.

5 The City is a municipality authorized by law to provide utility service to its citizens
6 without the need for a CC&N. A.R.S. § 9-511. If Rigby is voluntarily acquired by the City,
7 then Rigby will seek deletion of its CC&N from the Commission. It will not, however,
8 seeks a transfer of its CC&N to the City or any other entity. Similarly, if Rigby is
9 condemned by the City, there will be no transfer of Rigby's CC&N to the new municipal
10 provider. Accordingly, Rule R14-2-406(F) has no applicability to the present situation and
11 the Complaint's allegations with respect to the Rule should be dismissed for failure to state
12 a claim upon which relief may be granted.

13 WHEREFORE, having fully answered the Complaint, Rigby Water Company
14 respectfully requests that:

- 15 a) this matter be dismissed with prejudice as untimely;
16 b) this matter be dismissed with prejudice for lack of jurisdiction and/or failure to
17 state a claim upon which relief may be granted; or alternatively,
18 c) that judgment be entered in favor of Rigby Water Company and against
19 Complainant, Mr. Dains, and that Mr. Dains take nothing by way of his Complaint; and
20 d) such other and further relief as may be deemed appropriate.

21 DATED this 13th day of April, 2009.

22 BRYAN CAVE LLP

23
24 By 

25 Steven A. Hirsch, #006360

26 Stanley B. Lutz, #021195

27 Two N. Central Avenue, Suite 2200

28 Phoenix, AZ 85004-4406

Attorneys for Beardsley Water Company

1 **ORIGINAL** and 13 copies of the foregoing
2 filed this 13th day of April, 2009 with:

3 Docket Control Division
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, Arizona 85007

7 and

8 COPY of the foregoing mailed
9 this 13th day of April, 2009, to:

10 Lyn Farmer, Esq.
11 Chief Hearing Officer
12 Arizona Corporation Commission
13 1200 W. Washington
14 Phoenix, AZ 85007

15 Mr. Ernest Johnson
16 Director, Utilities Division
17 Arizona Corporation Commission
18 1200 W. Washington
19 Phoenix, AZ 85007-2927

20 Janice Alward, Esq.
21 Chief Legal Counsel
22 Legal Division
23 Arizona Corporation Commission
24 1200 W. Washington Street
25 Phoenix, AZ 85007-2926

26 and

27 Craig A. Marks, Esq.
28 Craig A. Marks, PLC
10645 North Tatum Boulevard
Suite 200-676
Phoenix, Arizona 85028

Lori De Las Santos

Exhibit A



**FIRST
NATIONAL
MANAGEMENT
INCORPORATED**

1832 S. Mac Donald, Suite 201 • Office: (602) 833-2027
P.O. Box 1289 • Mesa, AZ 85211-1289 • FAX: (602) 833-3250

January 26th, 1995 ¹⁹⁹⁶

Mr. Charles Dains
Sundowners Motors, Inc.
4439 W. Glendale Ave.
Glendale, Arizona 85301

Re: Tierra Mobile Ranchettes Estates Subdivision.

Dear Mr. Dains:

First National Management, Inc. is the agent for Rigby Water Company. Rigby Water Company is a public service corporation operating under the jurisdiction of the Arizona Corporation Commission and is required to comply with the various rules and regulations of the Commission.

Accordingly, we are providing to you a copy of Rule R14-2-406 regarding Main Extension Agreements. This Rule sets forth the requirements that must be followed in order to provide water service to your proposed development. Please review the Rule and contact us should you have any questions or comments regarding the Rule.

The Rule will require the parties to enter into a Main Extension Agreement. The Agreement requires the applicant to cause the water system to be constructed and the Utility to refund the cost of the system to the applicant under certain terms and conditions.

We have had our engineer and field personnel review your proposed water plans to serve the above referenced subdivision and have no comments or corrections at this time. We are, however, concerned with the questionable storage requirement.

At this writing, we have approximately 60,000 gallon storage capacity. If additional storage capacity is required, we will need to discuss this matter in greater detail. We suggest you have your engineer contact the Arizona Department of Environmental Quality to determine what additional storage may be required, if any.



At such time as you have had the opportunity to review the enclosed Rule and determined the storage requirements, we suggest we arrange a meeting to discuss any additional matters.

Sincerely,

Fred T. Wilkinson
President

cc: RF
File
Mr. McKinniss (First National Management, Inc.)

Exhibit B

July 25, 2006

JUL 27 2006

Mr. Ted Wilkinson
First National Management Incorporated
P. O. Box 1020
Apache Junction, AZ. 85217-1020

Re: Water System Reimbursement
Terra Ranchette Estates Subdivision

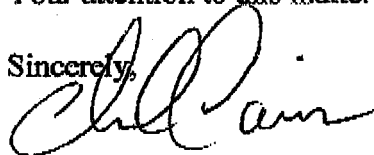
Dear Mr. Wilkinson:

I am in receipt of my payment for calendar year 2005-2006, which reflects the annual reimbursement/refund for payments made to construct the water system in 1998. A question was raised as to how is this payment calculated? According to the enclosed documentation annual payments are based upon ten percent of the water usage for the development. In a letter from First National Management Incorporated dated June 26, 1998 the estimated use assumes that the average annual water billing is 719,000 gallons per lot. This would have been sufficient to amortize the payments at approximately twelve thousand dollars per year over twenty years (a straight line amortization at no interest would have been \$11,849.43 per year).

The problem that has now been identified by our attorney is that this estimate was grossly overstated, and contrary to the capacity paragraph estimate of 140 gallons per person, per day, based on three person occupancy. This works out to be 153,300 annual billing gallons per lot. This, obviously, needs to be corrected as soon as possible. At this rate we would receive twenty one percent (21%) payback over twenty years. Rigby Water Company is being unjustly enriched. Not only is the reimbursement/refund woefully insufficient, but the water company has received an asset (the water distribution system) that has provided tax benefits, and will be sold, most likely to the City of Avondale, at a profit. We should also address payment in full at close of escrow should the water company be sold. It is only fair that reconciliation be provided quickly.

Your attention to this matter is greatly appreciated.

Sincerely,



CHARLIE DAINS - Terra Ranchettes Estates
c/o Charlie Dains - 602-376-9121
Sun Dancer Motors
4439 W. Glendale Avenue
Glendale, AZ. 85301

Enclosures as cited

Exhibit C

**ARIZONA CORPORATION COMMISSION
UTILITY COMPLAINT FORM**

Investigator: Brad Morton

Phone: (602) 542-0836

Fax: (602) 542-2129

Priority: Expedite

Complaint No. 2006 - 56033

Date: 10/19/2006

Complaint Description: 03D New Service - Main/Line Extensions

Complaint By: **First:** Charlie **Last:** Dains

Account Name: Charlie Dains

Home: (623) 000-0000

Street: 4439 W. Glendale Avenue

Work:

City: Glendale

CBR:

State: AZ **Zip:** 85301

is:

Utility Company: Rigby Water Company

Division: Water

Contact Name: Fred Wilkinson

Contact Phone: (602) 833-2027

Nature of Complaint:

October 11, 2006 RECEIVED
Mr. Ernest Johnson 0 CT 132006
Director - Utilities Division
Arizona Corporation Commission AZ CORP COMM
1200 W. Washington Street Director Utilities
Phoenix, AZ. 85007
RE: Terra Mobile Ranchettes Estates and the Rigby Water Company

Dear Director Johnson:

The attached packet of material relates to a dispute we are currently having with the Rigby Water Company. A demand has been made for both an accounting of water delivered to the Terra Mobile Ranchettes Estates development for the last four years and return of capital for the water system that was constructed in accordance with a Main Extension Agreement.

Indications are that the Utilities Division and the ACC itself never approved this agreement. Research indicates that no agreement is on file going back to 1988.

Before anyone thinks that this is a matter of some "greedy developer" attempting to get out of a bad business deal, I want the Commission and the Utilities Division to understand that Rigby's own representatives significantly overstated water usage to my father, who is now 86 years old, who had no background or experience in utility matters. Several times, we tried to obtain usage information and an explanation as to the basis for the original estimates. The only thing we received back was a threatening letter from an attorney, who did not address our concerns.

This letter is part of our notification to the ACC that demands have been formally made. We appreciate your time in allowing us the opportunity to bring this matter to your attention, and would ask that if this item needs to be forwarded to either your legal department or to the Docket Control office, please take whatever action you deem appropriate. Again, my thanks.

ARIZONA CORPORATION COMMISSION
UTILITY COMPLAINT FORM

Charlie Dams (for the family)
4439 W. Glendale Avenue
Glendale, AZ. 85301

Attachments – Main Extension Agreement, letters, etc.

Cc: Almost identical letters have also been sent to the ACC Commissioners

*****Please provide Commission with a copy of your approved main line extension regarding this consumer.

End of Complaint

Utilities' Response:

Investigator's Comments and Disposition:

Date Completed:

Complaint No. 2006 - 56033

Substantiated/Un-Substantiated not yet determined

Notes: